STATE OF MICHIGAN

IN THE SUPREME COURT

KENNETH HENES SPECIAL PROJECTS, PROCUREMENT, MARKETING AND CONSULTING CORPORATION,

Plaintiff-Appellee,

v.

CONTINENTAL BIOMASS INDUSTRIES, INCORPORATED,

Defendant-Appellant.

Case No. 120110

U. S. Court of Appeals for the Sixth Circuit Docket No. 00-1267

Appeal from the U.S. District Court for the Eastern District of Michigan No. 98-CV-72966-DT Honorable Gerald E. Rosen

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DEFENDANT-APPELLANT CONTINENTAL BIOMASS INDUSTRIES INC'S BRIEF ON QUESTION OF LAW CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*** * * ORAL ARGUMENT REQUESTED* * ***

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant CBI requests an opportunity to be heard at oral argument. The legal question certified to this Court is intricate, and CBI believes that the Court will benefit from an opportunity to hear the parties' analysis of the issue, and to have counsel respond to questions.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider the certified question from the United States Court of Appeals for the Sixth Circuit under MCR 7.301(A)(5), which provides that "[t]he Supreme Court may . . . respond to a certified question." Additionally, MCR 7.305(B)(1) provides that "[w]hen a federal court . . . considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative . . . certify the question to the Michigan Supreme Court."

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STATEMENT OF THE CASE

A. Case Overview

Plaintiff sued Continental Biomass Industries, Inc ("CBI") for breach of contract in state court, alleging that after he was terminated as its exclusive sales representative for five Midwestern states, CBI failed to pay him commissions that he was owed.

After CBI removed the case to federal court based on diversity of citizenship, plaintiff amended his complaint to add a count under Michigan's Sales Representative Commission Act ("SRCA" or "the Act"). In addition to authorizing recovery of disputed commissions, the Act provides for an additional recovery of either two times the amount of the commissions due, or $100,000 (whichever is less), if a plaintiff proves that the defendant "intentionally failed to pay" the commissions when due. (See MCLA. 600.2961(5)(b); M.S.A. 27A.2961(5)(b), and discussion, *infra*).

The case went to trial. The federal-court jury concluded that plaintiff was entitled to the commissions at issue, and that CBI "intentionally" failed to pay commissions with respect to three of the four disputed transactions.

CBI appealed the district court's amended judgment to the United States Court of Appeals for the Sixth Circuit, seeking reversal of the district court's award of penalty damages and attorney fees under the SRCA. On appeal, CBI argued that the double-damages penalty in the SRCA is punitive in nature, and that such damages should not be available where there was a good-faith, bona-fide dispute over whether the commissions were owed. Plaintiff countered that the penalty damages are available any time the nonpayment of commissions was voluntary and conscious, meaning that penalty damages are available for nonpayments attributed to anything other than a clerical error.

After the parties' appeal briefs were filed with the Sixth Circuit, but before oral argument, the Michigan Supreme Court released its opinion in *Frank W Lynch & Co v Flex Technologies,*

Inc, 463 Mich 578 (2001). In *Lynch*, the Court concluded that the SRCA's double-damages provision "clearly serves a punitive and deterrent purpose," and "is indisputably punitive, not compensatory." *Id* at 586, n4. This holding was significant in *Lynch* on the issue of whether the statute could be given retroactive effect.

After oral argument, the Sixth Circuit issued a "Certificate to the Michigan Supreme Court" asking this Court to determine what state of mind is required to prove an "intentional" failure to pay commissions, so as to trigger the now "indisputably punitive" double-damages provision of the SRCA.

B. Statement of Pertinent Facts

The Parties

In 1988, Anders Ragnarsson started a wood waste processing company in New Hampshire named Continental Biomass Industries. (Ragnarsson, TR. Vol. 3 at 342, **Apx.** at 120a). When Mr. Ragnarsson became dissatisfied with the equipment used by the company, he developed a more effective machine. *(Id.)* Once Mr. Ragnarsson's machine was operational, others became interested in buying the machine, and CBI shifted its focus from processing to manufacturing machinery for the industry. (*Id.* at 343, **Apx.** at 121a).

Plaintiff Kenneth Henes Special Projects Procurement, Marketing and Consulting Corporation is a business owned and operated by Kenneth Henes out of Dexter, Michigan. Plaintiff describes his business as a supplier of waste equipment to the waste disposal industry.

The Sales Representative Agreement

In 1989 and the early 1990s, plaintiff made overtures toward becoming a sales representative for CBI. (Henes, TR at 77-79, **Apx.** at 48a-50a; Ragnarsson, TR. Vol. 3 at 343-345, **Apx.** at 121a-123a). In late 1995, plaintiff renewed his interest in selling CBI products. (Ragnarsson, TR. Vol. 3 at 347, **Apx.** at 124a). Mr. Ragnarsson flew to Michigan in January 1996 in conjunction with a Chicago sales trip, and discussed this with plaintiff. (*Id.* at 348, **Apx.**

at 125a). While Mr. Ragnarsson and plaintiff drove to Chicago together for a joint sales presentation to a prospective customer, they reached an agreement. (*Id.* at 352, **Apx.** at 126a).

Mr. Ragnarsson and plaintiff started by defining plaintiff's territory, "which was Michigan, Ohio, Indiana, Illinois and Wisconsin." (*Id.* at 353, **Apx.** at 127a; Henes, TR. Vol. 2 at 81, **Apx.** at 51a). It was "an exclusive" sales representative agreement. (Henes, TR. Vol. 2 at 81, **Apx.** at 51a). Plaintiff testified that he had the exclusive right to sell "anything that CBI was manufacturing," as well as used equipment. (*Id.* at 81-82, **Apx.** at 51a-52a). With respect to the five states in plaintiff's region, CBI was to funnel the leads it got from national advertising to plaintiff for follow-up, so plaintiff could work on consummating sales. (Ragnarsson, TR. Vol. 3 at 353-354, **Apx.** at 127a-128a).

Plaintiff agreed to a ten percent commission rate. (Henes, TR. Vol. 2 at 82, **Apx.** at 52a). The ten percent figure applied to new equipment that CBI sold and delivered into plaintiff's territory. (Ragnarsson, TR. Vol. 3 at 354, **Apx.** at 128a). Mr. Ragnarsson and plaintiff also agreed that if a buyer located in plaintiff's exclusive territory purchased a machine and sent it to a landfill or facility outside of plaintiff's territory, CBI would pay plaintiff a five percent commission. (*Id.*) Likewise, if a buyer had its headquarters outside of plaintiff's territory, but purchased a CBI machine and delivered it into one of the five states in plaintiff's territory, CBI would pay plaintiff a five percent commission. (*Id.*)

The parties' testimony diverged somewhat regarding the implementation of their agreement with respect to sales outside plaintiff's territory, and in particular Canada. Plaintiff acknowledged that CBI already had another sales representative "for all of Canada." (Henes, TR. Vol. 2 at 90, **Apx.** at 53a). Plaintiff also admitted that he made an agreement with Mr. Ragnarsson regarding sales in Canada, under which plaintiff would only be entitled to make a sale and receive commission for a Canada sale if he first "register[ed] the customer in writing" -- that is, obtain Mr. Ragnarsson's written approval to pursue the sale. (*Id.* at 91, **Apx.** at 54a). This

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aspect of plaintiff's trial testimony was consistent with that of Mr. Ragnarsson, who explained that they agreed plaintiff would have to "register the customer" before going outside his territory to make a sale. (Ragnarsson, TR. Vol. 3 at 359, **Apx.** at 129a). Plaintiff had to provide a very strong reason to go outside his territory, because plaintiff's five-state territory was, in and of itself, a large territory to cover. (*Id.*) Therefore, written approval from Mr. Ragnarsson "was a must, yes." (*Id.* at 360, **Apx.** at 130a).

Plaintiff acknowledged that in the past he did secure Mr. Ragnarsson's written permission to pursue sales outside his territory, including one in Canada, but claimed that Mr. Ragnarsson later made oral statements to the effect that plaintiff need not bother with this procedure if plaintiff "pre-qualified" the potential customer, and the potential customer was not a national waste company. (Henes, TR. Vol. 2 at 91-92, **Apx.** at 54a-55a. See also Trial Exhs. 5 and 67, **Apx.** at 202a, 204a).

The Disputed Modifications of the Terms of the Sales Representative Agreement

At trial, plaintiff explained that under the terms of the agreement, he or CBI would "give each other fair notice and make some adjustments accordingly" in the event they decided to cease their relationship. (Henes, TR. Vol. 2 at 208, **Apx.** at 71a). Plaintiff agreed that CBI had the same right to terminate the agreement that plaintiff had. (*Id.* at 209, **Apx.** at 72a). Plaintiff also acknowledged that Mr. Ragnarsson could "do anything he want[ed] to" with respect to reducing the scope of plaintiff's representation geographically or in terms of equipment sold. (*Id.* at 268, **Apx.** at 83a).

Plaintiff testified that as early as March 1997, he and Mr. Ragnarsson discussed reducing plaintiff's territory, and plaintiff agreed with Mr. Ragnarsson's assessment that the five-state region would be too big an area for plaintiff to properly handle in the future. (*Id.* at 265-267, **Apx.** at

80a-82a). Plaintiff denied, however, any discussion about losing product. (*Id.* at 267, **Apx.** at 82a).

Despite earlier discussions about reducing the scope of his representation, plaintiff testified that he was shocked to receive an October 1, 1997 correspondence from Mr. Ragnarsson indicating that CBI had elected to sell its "mobile" machines through dealers, as opposed to independent sales representatives such as plaintiff. (*Id.* at 269-271, **Apx.** at 84a-86a). Plaintiff felt that it was unfair of CBI to give him only 90 days to close deals he was currently working on for the sale of mobile units. (*Id.* at 271, **Apx.** at 86a). He recalled discussing a "more gradual" review of his accounts should a change be made, and requested an extension of time from CBI. (*Id.* at 271-272, **Apx.** at 86a-87a).

Mr. Ragnarsson agreed to an extension, extending the original December 30, 1997 deadline for closing potential mobile-unit sales "60 days or until February 28, 1998." (*Id.* at 274-275, **Apx.** at 88a-89a; see also Ragnarsson, TR. Vol. 3 at 401, **Apx.** at 146a). Plaintiff testified that he refused to acquiesce to this arrangement, whereby he would be limited to the sale of stationary units. (Henes, TR. Vol. 2 at 276-277, **Apx.** at 90a-91a).

After CBI and plaintiff were unable to reach a new agreement regarding plaintiff's service as a sales representative, plaintiff was ultimately terminated on May 19, 1998. (Ragnarsson, TR. Vol. 3 at 416, **Apx.** at 151a; Henes, TR. Vol. 2 at 283, **Apx.** at 92a).

The Four Sales Transactions at Issue in this Case

The May 20, 1998 Sale to Mega City Recycling in Toronto

In early 1998, a Toronto businessman named Lawrence Herman became interested in CBI equipment after watching videotapes plaintiff previously forwarded to a company in Mt. Clemens, Michigan. (Henes, TR. Vol. 2 at 158-159, **Apx.** at 67a-68a). Upon learning of this, plaintiff sent videotapes and brochures to Mr. Herman's Canada address. (*Id.* at 160, **Apx.** at 69a).

Mr. Herman called Mr. Ragnarsson in the Spring of 1998, and indicated that he was starting up an operation in Toronto and was looking for a "grinder" machine. (Ragnarsson, TR. Vol. 3 at 385-386, **Apx.** at 137a-138a). Mr. Ragnarsson invited Herman to visit CBI to look at some machines, and offered to take Herman to other facilities to see CBI machines in operation. (*Id.* at 386, **Apx.** at 138a).

Before Herman visited the CBI facility in New Hampshire, Mr. Ragnarsson had a conversation with plaintiff regarding Herman. (*Id.* at 387, **Apx.** at 139a). Plaintiff called and reported that he spoke to Herman and sent him a videotape and "wanted to pursue a lead in Toronto, Canada." (*Id.*) Mr. Ragnarsson testified that his "response was, no, that's not your territory," and that this is a lead that CBI would "pursue from here." (*Id.*) Given the previous discussion concerning the need to reduce the size of plaintiff's existing territory, Mr. Ragnarsson saw no reason why plaintiff should handle a potential transaction with a Toronto buyer. (*Id.* at 387, **Apx.** at 139a). Mr. Ragnarsson declined to register this out-of-territory customer to plaintiff. (*Id.* at 389, **Apx.** at 140a). Although plaintiff did not think that was fair, Mr. Ragnarsson "simply pointed out it's not your territory," and that CBI would handle it from there. (*Id.*)

Herman later traveled to the CBI facility, and Mr. Ragnarsson showed him available units and took him to other facilities to see CBI's grinding machine at work. (*Id.*) By the time Herman obtained financing, however, the machines that CBI previously had available were sold. (*Id.* at 390, **Apx.** at 141a). Mr. Ragnarsson eventually contacted a California company that had a machine it was not using, and directed Herman to that machine. (*Id.*) When Herman approved the machine, Mr. Ragnarsson bought the machine from the California company, and had it shipped to Mr. Herman in Toronto. (*Id.*) After delivery, CBI serviced the equipment from New Hampshire. (*Id.* at 393, **Apx.** at 143a).

Mr. Ragnarsson testified that the California machine was not officially on the market before he contacted the California company, and that plaintiff had "[n]othing" to do with that

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transaction. (*Id.* at 392-393, **Apx.** at 142a-143a). Plaintiff did not receive any commission on the sale. (Henes, TR. Vol. 2 at 165, **Apx.** at 70a).

Although admitting that Mr. Ragnarsson did not give him written authorization to handle this Canada sale (*id.* at 213, **Apx.** at 73a), plaintiff claimed a $37,500 commission. Plaintiff argued that he initiated the transaction, and that Mr. Ragnarsson told him he did not want to be bothered with requests for written authorizations anymore. (*Id.* at 214, **Apx.** at 74a). Mr. Ragnarsson testified that plaintiff was not entitled to a commission on that sale because the "sale was made outside [plaintiff's] exclusive territory." (Ragnarsson, TR. Vol. 3 at 394, **Apx.** at 144a).

The May 7, 1998 Sale to Midwest Forestry Products

Plaintiff also sought a commission in the amount of $50,200 for the May 7, 1998 sale of a mobile unit to Midwest Forestry Products in Illinois. (Plaintiff's Opening, TR. Vol. 1 at 55, **Apx.** at 47a).

In 1997, Midwest Forestry was looking for a machine to grind tree stumps and brush. (Ragnarsson, TR. Vol. 3 at 400, **Apx.** at 145a). Mr. Ragnarsson came into contact with Midwest Forestry's Vice President in charge of Sales and Operations, Steven Berglund, at an Atlanta trade show. (*Id.* at 408, **Apx.** at 147a). After the trade show, Berglund phoned Mr. Ragnarsson. Mr. Ragnarsson sent Berglund's name and phone number to plaintiff so plaintiff could follow-up on the potential sale. (*Id.* at 409, **Apx.** at 148a).

The proposed sale was never consummated. (Henes, TR. Vol. 2 at 136, **Apx.** at 62a). Instead, Midwest Forestry purchased a machine from one of CBI's competitors in the Fall of 1997. (*Id.* at 263, **Apx.** at 79a). Plaintiff testified that he stayed in touch with Berglund by making follow-up telephone calls, but after a few months Berglund told plaintiff "don't bug me anymore." (*Id.* at 156, **Apx.** at 65a). Later, plaintiff learned that he had offended Mr. Berglund by making comments critical of Berglund's decision to purchase a competitor's machine. (*Id.* at 157-158,

Apx. at 66a-67a). Plaintiff conceded that after Midwest Forestry's purchase of a competitor's product in the Fall of 1997, Midwest Forestry was "temporarily" out of the market. (*Id.* at 263, **Apx.** at 79a).

In April 1998 (after CBI's directive that plaintiff was no longer authorized to sell CBI mobile units, and after expiration of the extended February 28, 1998 cutoff for plaintiff to close any mobile-unit deals in the works), Mr. Berglund contacted Mr. Ragnarsson indicating that Midwest Forestry anticipated getting a new contract to grind railroad ties in Wisconsin. (Ragnarsson, TR. Vol. 3 at 334, 330, **Apx.** at 117a, 114a). This was not a replacement machine for the one purchased earlier from a competitor, as that machine worked out "just fine." (*Id.* at 333, **Apx.** at 116a). Rather, Midwest Forestry needed another machine to deal specifically with the new Wisconsin job. (*Id.* at 333-334, **Apx.** at 116a-117a).

Because of the nature of the new contract, CBI had to build a machine "more specifically" for Midwest Forestry's application. (*Id.* at 334, **Apx.** at 117a). Mr. Ragnarsson and Berglund discussed different options and "how to build a machine so that it would suit his job." (*Id.* at 413, **Apx.** at 149a). The machine required special hammers and a different internal process to handle railroad ties, because railroad ties had steel plates that needed to be removed from the wood before it could be ground up and sold for fuel. (*Id.*)

Mr. Ragnarsson was able to close this sale. (*Id.* at 414, **Apx.** at 150a). He handled the sale personally, and prepared the proposal based on the unique specifications for Midwest Forestry's new job. (*Id.* at 330-331, 413, 414, **Apx.** at 114a-115a, 149a, 150a). Plaintiff admitted that the transaction was not completed by his February 28, 1998 deadline for closing mobile unit sales. (Henes, TR. Vol. 2 at 284-285, **Apx.** at 93a-94a).

Plaintiff argued that the machine ultimately sold to Midwest Forestry was "identical," other than horsepower, to the machine he originally quoted Midwest Forestry back in September 1997. (*Id.* at 155, **Apx.** at 64a). He argued that because the sale occurred in his exclusive

territory, he was entitled to a commission whether he actually participated in the sale or not. (Plaintiff's Closing, TR. Vol. 4 at 465, **Apx.** at 157a). Plaintiff also argued that he never agreed to have mobile units removed from the scope of his sales representation. (*Id.* at 466, **Apx.** at 158a).

Mr. Ragnarsson testified that plaintiff was not entitled to a commission on the Midwest Forestry sale because "[o]n October 1st, we put Mr. Henes on notice that he will no longer represent the portable machines as of December 30, 1997," and then "extended that deadline to February 28th, " -- but the sale to Midwest Forestry "did not get closed within that February 28th deadline." (Ragnarsson, TR. Vol. 3 at 329, **Apx.** at 113a). Plaintiff also was not "involved in the sale." (*Id.*)

The June 13, 1997 Sale of Mobile Unit to Draw Leasing/Suburban Recycling.

Plaintiff also claimed a $35,000 commission on the June 13, 1997 sale of a used "road mill" mobile unit to a company owned by George Ward. The Ward family owned a number of companies located across the country. CBI's June 30, 1997 invoice was directed to Draw Leasing in Chicago, showing that the machine was being sold to another Ward family company, Suburban Warehouse, in Riverdale, Illinois. (Henes, TR. Vol. 2 at 125, **Apx.** at 59a). Mr. Ragnarsson testified, however, that the unit "was scheduled to go to Georgia from day one." (Ragnarsson, TR. Vol. 3 at 381, **Apx.** at 135a). The June 13, 1997 invoice identifying Suburban Warehouse was simply incorrect. (*Id.* at 381-382, **Apx.** at 135a-136a). In fact, Mr. Ward called Mr. Ragnarsson's secretary and told her that CBI had invoiced the wrong company because "[t]his machine is going to Georgia and I'm going to lease it to Georgia through my Draw Leasing Corporation." (*Id.* at 382, **Apx.** at 136a). The original invoice was voided, and a new invoice was prepared. (See Trial Exh. 17, **Apx.** at 203a).

Plaintiff admitted that the machine was delivered to Georgia. (Henes, TR. Vol. 2 at 223-224, **Apx.** at 76a-77a). Plaintiff also acknowledged that the documentation generated in

connection with the sale showed delivery of this mobile unit to Georgia Recycling, and that Georgia Recycling is located in Georgia. (*Id.* at 217, **Apx.** at 75a).

Plaintiff asserted that he was entitled to a commission because he was involved in Chicago meetings with Mr. Ward and Mr. Ragnarsson where they discussed Mr. Ward's interest in obtaining "a heavy-duty mobile grinder." (*Id.* at 125, **Apx.** at 59a). Plaintiff testified that he submitted the proposal to Mr. Ward, and that Suburban Warehouse, identified on the original invoice, was located in his territory. (*Id.* at 126-127, **Apx.** at 60a-61a).

Mr. Ragnarsson testified that plaintiff was not entitled to a commission on the sale because the unit was sold to Georgia Recycling, in Georgia. (Ragnarsson, TR. Vol. 3 at 377, **Apx.** at 132a). Although it was financed by Draw Leasing, in Chicago, it was sold to Georgia Recycling and was delivered to Georgia, where it was used by the customer. (*Id.*) Mr. Ragnarsson testified that he and plaintiff agreed that plaintiff would not get a commission under such circumstances, and cited to a previous sale (not at issue in this case) where a stationary unit was sold to a leasing company and then delivered to an entity in Georgia, where plaintiff did not seek a commission. (*Id.* at 377-378, **Apx.** at 132a-133a; Henes, TR. Vol. 2 at 223, **Apx.** at 76a). Mr. Ragnarsson testified that Mr. Ward's Draw Leasing Company was essentially a finance company, and "if this industry were to start to pay commission on where finance companies are located, it would throw everything completely upside down." (Ragnarsson, TR. Vol. 3 at 378, **Apx.** at 133a). He explained that "[a] location of a finance company has never and I don't think will ever be a triggering factor for who gets paid commission, because a lot of these financial institutions, they can be located across the country where nobody has anything to do with selling a piece of equipment." (*Id.*)

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The December 1996 Sale of Stationary Unit to Draw Leasing

Plaintiff also sought an additional three percent commission, above and beyond five percent already paid, on the December 1996 sale of a $583,000 stationary unit to Draw Leasing in Chicago. (Plaintiff's Opening, TR. Vol. 1 at 50, **Apx.** at 46a). Plaintiff testified that this machine was originally going "to Georgia," outside his territory. (Henes, TR. Vol. 2 at 101, **Apx.** at 56a). Because the machine was to go outside his territory, plaintiff was paid a five percent commission. (Ragnarsson, TR. Vol. 3 at 307-308, 318, **Apx.** at 104a-105a, 108a). But Mr. Ward later ran into difficulties using the machine at his Georgia location, and plaintiff believed Mr. Ward's statements intimated that the machine was going to Chicago instead. (Henes, TR. Vol. 2 at 103, **Apx.** at 57a). While Mr. Ward was deciding where the machine would be installed, it remained with CBI in New Hampshire indefinitely (and after trial was eventually delivered to Florida). (Ragnarsson, TR. Vol. 3 at 316, **Apx.** at 107a).

Believing that the machine was going to be sent to Chicago, plaintiff claimed a full, ten percent commission. (Henes, TR. Vol. 2 at 231, **Apx.** at 78a). Mr. Ragnarsson disputed plaintiff's entitlement to a full ten percent commission, and the two eventually compromised by agreeing to an eight percent figure. (*Id.*) Plaintiff was paid five percent. (*Id.*) Payment of the remaining three percent commission was initially conditioned on the placement of a system of equal or similar value outside plaintiff's territory, and at trial the parties disputed how and whether those conditions were later altered. (*Id.* at 107, **Apx.** at 58a). Mr. Ragnarsson testified that he intended to pay the remaining three percent balance ($12,500) if the machine was ultimately delivered to plaintiff's former territory. (Ragnarsson, TR. Vol. 3 at 315, 321-324, **Apx.** at 106a, 109a-112a). Mr. Ragnarsson's position with respect to this sale "has always been and still is, that I can't pay it until the final destination is determined." (*Id.* at 379, **Apx.** at 134a). Plaintiff's position is that he effectuated a sale to an entity within his former territory, and therefore was entitled to full commission.

C. Procedural History

Pre-Trial Proceedings

Plaintiff filed a breach of contract suit against CBI in state court seeking recovery of allegedly unpaid commissions. CBI removed the case to the United States District Court for the Eastern District of Michigan based on diversity of citizenship. Plaintiff later amended its complaint to state an additional claim for penalty damages under the SRCA. (Amended Complaint, **Apx.** at 27a).

The Trial

The case was tried over approximately four days. As the proofs came to a close, a dispute arose concerning the proper jury instructions for plaintiff's claim for penalty damages under the SRCA.

Commentators have observed that "[t]he most glaring omission in Section 2961 [i.e., the SRCA] is its failure to define the term 'intentionally failed to pay.'" Larry J. Saylor & Frederick A. Acomb, *Michigan Sales Representative Statute*, 73 Mich. B.J. 208, 208-209 (1994). Noting this omission, CBI argued that the jury needed guidance from the court on the meaning of the phrase, and proposed this one-sentence definition:

> Intentional failure to pay means that Defendant knew a commission was due to the Plaintiff and chose not to pay it.
>
> [Opinion and Order, at 20, **Apx.** at 228a.]

CBI argued that there "was something more than strict liability here and that had to be some finding of purposefulness," before the additional, double-damages penalty could be imposed. (TR. Vol. 4 at 437-438, **Apx.** at 152a-153a).

The district court's preference, however, was to merely "track the statute." *Id.* The court admitted that it was "hard to tell whether the doubling is intended to be punitive for an intentional failure to pay when the amounts were reasonably known to be due or if it is simply

intended to be a doubling of the amount when the defendant did not pay the commissions when they were actually due." *Id.* But the court was swayed by plaintiff's counsel's argument that the use of the term "intentional must have been used simply to distinguish between circumstances where some negligent clerical oversight resulted in the principal overlook[ing] the obligation to pay." *Id.* Therefore, the district court's jury instruction on plaintiff's statutory claim for penalty damages simply mirrored the language of the statute, and provided no elaboration on the term "intentionally":

> If a principal is found to have intentionally failed to pay the commission when it is due, the principal is liable for the overdue commissions and for an additional amount equal to two times the overdue commission, or $100,000, whichever is less.
>
> So if you find if there is a commission due, if you find that Mr. Ragnarsson breached his contract on one or more of these transactions, you find that there's a commission due, you must then find if he intentionally failed to pay the commission when it was due.
>
> And if so, if you find that he intentionally failed to pay it, then he is liable for either two times the amount of the overdue commission or $100,000, whichever is the lesser amount.
>
> [*Id.* at 526-527, **Apx.** at 183a-184a.]

During closing arguments, plaintiff's counsel urged the jury to "use your common sense on what intentional means." (*Id.* at 498, **Apx.** at 161a).

The jury found that plaintiff was entitled to recover the disputed commissions for all four of the transactions at issue, and awarded plaintiff $135,193 -- the combined amount of the outstanding commissions. (Verdict Form, **Apx.** at 205a-207a).

Additionally, the jury found that CBI intentionally refused to pay plaintiff's commission for three of the transactions at issue -- the June 1997 sale of the used Road Mill mobile unit to Draw Leasing, the May 1998 sale of a mobile unit to Midwest Forestry Products, and the May 1998 sale of the used stationary unit to Mega City Recycling in Toronto. (See *id.*) The jury found

no intentional failure to pay plaintiff's commission for the December 1996 sale of the stationary unit to Draw Leasing. (See *id.*)

The district court entered a judgment awarding plaintiff actual damages in the amount of $135,193, and an additional $122,300 in penalty damages. (Judgment, **Apx.** at 208a; Opinion and Order at 26-27, **Apx.** at 234a-235a).

Post-Trial Motions

CBI filed a motion for new trial and amendment of the judgment arguing, among other things, that the trial court's penalty-damages instruction was insufficient because it did not define the term "intentionally." (See *Id.)* The district court rejected this argument (but agreed that plaintiff's penalty damages should have been limited to $100,000). (Opinion, **Apx.** at 209a *et seq.*). The district court entered an amended judgment providing a total damage award of $235,193, plus the attorney fees and interest. (Amended Judgment, **Apx.** at 249a).

CBI's Appeal in the Sixth Circuit

CBI appealed the district court's amended judgment. One of its main arguments on appeal concerned the trial court's failure to provide the jury with any instruction whatsoever on the meaning of the phrase "intentionally failed to pay." CBI asked that the case be remanded for a new trial where the jury would be instructed that this phrase refers to willful, bad-faith nonpayments.

The plaintiff countered that the term "intentionally" should be construed according to its common, dictionary definition, and argued that any time the nonpayment of commissions does not result from a mere accidental clerical mistake, penalty damages are appropriate.

After the briefing phase of the appeal was completed, this Court released an opinion holding that the SRCA's double-damages provision "is indisputably punitive, not compensatory."

Frank W. Lynch & Co v Flex Technologies, Inc, 463 Mich 578, 586 n4 (2001). CBI notified the Sixth Circuit of the *Lynch* decision and its impact on the issues raised on appeal.

The appeal was argued in the Sixth Circuit on August 9, 2001. At oral argument, counsel for CBI emphasized that this Court's *Lynch* decision refuted the district judge's conclusion that the SRCA's double-damages penalty is compensatory in nature, which was the linchpin of the district court's decision that no instruction on the phrase "intentionally failed to pay" was necessary. The panel members posed some questions concerning what the appropriate threshold should be for the recovery of penalty damages, and asked CBI's attorney how CBI's proposed jury instruction reflected those principles.

The Certified Question

On September 21, 2001, the Sixth Circuit issued a "Certificate to the Michigan Supreme Court," asking this Court to provide guidance "on what level of intent is needed to invoke the double-damages provision" of the SRCA, "a question of Michigan law on which there is no controlling Michigan Supreme Court precedent." (See Certificate at p 1; **Apx** at 250a). The Sixth Circuit observed that this Court's *Lynch* decision "resolve[d] the question of whether the statute's double-damages provision is punitive in nature," and that therefore the federal district court's "failure to instruct on intentionality was error." *Id* at 3, 4; **Apx** at 252a-253a. But the Sixth Circuit was unsure what state-of-mind standard to adopt (presumably for purposes of establishing a proper jury instruction to be used on remand).

The Sixth Circuit noted that there "are several possible standards which could apply: the 'good faith' standard required for commercial transactions under the Uniform Commercial Code, . . . the common-law good faith standard; or a bad-faith standard." *Id* at 4; **Apx** at 253a. The Sixth Circuit certified the question to this Court "[b]ecause this is a policy question more appropriately ruled upon by the Michigan Supreme Court," and "[o]therwise, a federal court will be dictating in an area of state law." *Id.*

This Court issued an order accepting the certified question on April 30, 2002.

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SUMMARY OF ARGUMENT

The SRCA contains a punitive, double-damages penalty that is triggered if a defendant "is found to have intentionally failed to pay" a commission when due. These punitive damages should not be permitted absent proof of subjective bad faith, i.e., proof that the defendant knew commissions were owed but still refused to pay them.

The SRCA does not define the term "intentionally" or otherwise elaborate on its meaning. But Michigan caselaw interpreting other penalty-damage statutes reveals a strong policy against awarding penalties absent willful, bad-faith conduct. Moreover, the prevailing view in jurisdictions across the country is that statutory penalty damages cannot be imposed where a defendant fails to pay commissions or wages because of a good-faith, bona fide dispute over its obligation to pay.

A subjective bad-faith standard is appropriate because it would protect defendants who acted in good faith from being held liable for punitive damages. And a subjective bad-faith standard would still further the SRCA's goal of deterring "recalcitrant principals" from withholding earned commissions in the hopes of forcing sales representatives to accept distress settlements or abandon earned commissions for fear of protracted and expensive litigation.

An objective good-faith standard would not be appropriate because under such a standard, a defendant who acted with a good-faith belief that no commissions were owed might still be exposed to punitive damages if a jury decides that a hypothetical "reasonable" person would have construed the sales-representation contract differently.

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ARGUMENT

Because the SRCA's double-damages penalty is punitive, these damages should not be permitted absent proof of subjective bad faith, i.e., proof that the defendant knew commissions were owed but still refused to pay them. This standard would further the policies underlying the double-damages penalty, while assuring that mere good-faith disputes do not activate punitive damages.

A. The SRCA's double-damages provision is a punitive measure.

Michigan's Sales Representative Commission Act was passed, and became immediately effective, on June 29, 1992. "The text of the statute indicates that the Legislature intended to ensure that sales representatives are paid the commissions to which they are entitled, especially where those commissions come due after the termination of the employment relationship." *Walters v. Bloomfield Hills Furniture*, 228 Mich App 160, 164; 577 NW2d 206, 208 (1998), *lv app denied* 459 Mich 938 (1999).

In addition to actual damages, the statute allows for an award of two-times the amount of the commissions due, not to exceed $100,000, if the defendant is found to have "intentionally failed to pay" commissions when due:

> (5) A principal who fails to comply with this section is liable to the sales representative for both of the following:
>
> > (a) Actual damages caused by the failure to pay the commission when due.
> >
> > (b) If the principal is found to have ***intentionally failed to pay*** the commission when due, in an amount equal to two times the amount of commissions due but not paid as required by this section, or $100,000.00, whichever is less.

[MCLA 600.2961(5) (emphasis added).]

In *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578; 624 NW2d 180 (2001), this Court concluded that the SRCA's double-damages provision "clearly serves a

punitive and deterrent purpose." *Id* at 586 (emphasis added). The Court had "no doubt that the SRCA authorizes a penalty," and that the double-damages provision "is ***indisputably punitive***, not compensatory." *Id* at 586 n4 (emphasis added).

In flatly rejecting the peculiar notion that the double-damages penalty is merely compensatory, this Court refused to accept the Eastern District's reasoning in the present case (see *Kenneth Henes Special Projects Procurement v Continental Biomass Industries, Inc*, 86 FSupp2d 721, 731-733 (ED Mich 2000)) or the Sixth Circuit's decision in *M & C Corp v Erwin Beer GmbH & Co*, 87 F3d 844 (6th Cir 1996). *See Lynch* at 587.

The *Lynch* Court's declaration that the SRCA's double-damages provision is "indisputably punitive" was entirely consistent with legislative history, which reveals that the Michigan Legislature adopted the SRCA, and in particular the double-damages-penalty provision, because of reports that manufacturers often withheld earned commissions in the hopes of forcing sales representatives to accept distress settlements or abandon earned commissions altogether for fear of expensive litigation:

> Knowing that recovery through the courts can be a costly and time-consuming proposition that many sales representatives would wish to avoid, some principals allegedly withhold earned commissions, thus forcing sales representatives either to accept distress settlements (i.e., a portion of their earned commissions not yet received) or to forgo the remuneration completely. To ensure that sales representatives receive commissions to which they are entitled, it has been suggested that prompt payment of posttermination commissions, and penalties for failure to make the payment, be statutorily mandated.
>
> [Bill Analysis, S.B. 717, June 15, 1992, Addendum A, at 1.[1]]

[1] CBI is mindful that this Court has cautioned against placing too much emphasis on Senate Fiscal Agency Bill Analyses when attempting to ascertain legislative intent. See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 (2001). But where a statute does not define a critical term and there is ambiguity, as with the "intentionally failed to pay" clause of the SRCA, resort to such analyses is justified. Both this Court and the Michigan Court of Appeals have looked to these analyses for guidance in the past. *See, e.g., Frame v Nehls*, 452 Mich 171, 179, 550 NW2d 739, 742 (1996); *County of Saginaw v. John Sexton Corp. of Michigan*, 232 Mich App 202, 216, 591 NW2d 52, 59 (1998).

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Michigan's Senate Fiscal Agency also emphasized that "the provision for awarding double damages in the event of noncompliance should ***deter recalcitrant principals*** from failing to pay earned commissions." *Id* at 2 (emphasis added).

Lynch was also harmonious with earlier Michigan Court of Appeals decisions that compared the SRCA's double-damages provision to other statutory multiple-damages provisions that have been declared punitive.

For example, in *H.J. Tucker & Assocs v Allied Chucker,* 234 Mich App 550; 595 N.W.2d 176 (1999) *lv app denied* 461 Mich 944 (2000), the Michigan Court of Appeals compared the SRCA's double-damage provision to various statutes permitting recovery of punitive damages:

> [W]e note that, like [the SRCA], other statutes contained within the [Michigan Revised Judicature Act] provide for the award of treble damages and specific sanctions for violations of their provisions. See, e.g., M.C.L. §600.2919; M.S.A. 27A.2919 (treble damages for anyone who cuts down trees, and so forth, without landowner's permission); M.C.L. 600.2911; M.S.A. 27A.2911 (exemplary and punitive damages possible in libel actions).
>
> [*H.J. Tucker, supra* at 556 n3; 595 NW2d at 180 n3.]

The statutes to which the *H.J. Tucker* panel compared the SRCA either explicitly provide for the recovery of punitive damages, or by virtue of a provision for treble damages have been interpreted to provide for damages that "are punitive in nature." See *Stevens v Creek,* 121 Mich App 503, 509; 328 NW2d 672, 675 (1983); see also MCLA 600.2911, MSA 27A.2911 (permitting claim for "punitive damages" if plaintiff demands retraction before instituting defamation suit).

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B. In Michigan, even exemplary damages (which are compensatory in nature) are not available absent malicious or willful misconduct. The SRCA's punitive damages provision should be triggered by nothing less – and this Court's precedent supports CBI's position that liability for these damages should attach only when nonpayment is motivated by subjective bad faith.

The idea that punitive or exemplary damages should not be allowed where a defendant has acted in good faith is a venerable one in this State. Even before the turn of the 20th Century, the Michigan Supreme Court took issue with a jury instruction allowing punitive or exemplary damages to be awarded based on a mere showing that a trespass occurred, without regard to the defendant's motives:

> [T]he effect, therefore, of the court's instruction was to authorize the assessment of punitive or exemplary damages in case the jury found any damages at all.
>
> The same elements and facts necessary to be found in order to recover actual damages were also made the basis alone for additional damages, termed punitive or exemplary by the court.
>
> The charge, therefore, failed to take into consideration the motives of the defendant in making the eviction. If [the defendant], in what he did, ***acted under the belief, honestly entertained, that he had a legal right to eject the plaintiffs, and keep them out of the premises, it was not a case for exemplary damages, and the jury should have been so instructed.***
>
> [*Baumier v Antiau*, 65 Mich 31, 42-43; 31 NW 888 (1887) (emphasis added).]

As this language shows, even in the late 1800s this Court adhered to the view that good-faith conduct cannot support an award of punitive damages.

But these principles are not musty jurisprudential relics. This Court's modern decisions also jealously safeguard against the imposition of punitive damages without a showing of conduct rising at least to the level of bad faith.

In *Peisner v Detroit Free Press, Inc*, 421 Mich 425; 364 NW2d 600 (1984), this Court considered the standard of proof necessary to recover "exemplary and punitive damages" under Michigan's libel statute. *See* MCLA 600.2911(2)(b). Even though the Court concluded that the

statute's explicit punitive-damages provision was nevertheless still only intended to compensate, the Court reaffirmed that "exemplary and punitive damages for libel cannot be awarded in the absence of a finding that the defendant acted with common-law malice -- in the sense of ill-will or bad faith -- in publishing the libel." *Peisner,* 421 Mich at 136.

The Court explained that this higher burden of proof was necessary to ensure that publishers acting recklessly, but in good faith, would not be subjected to exemplary or punitive damages -- permitting those damages only against those who have acted in bad faith:

> In essence, our balance is struck to limit the reporter acting recklessly, but in good faith, to liability for actual damages only, ***while the reporter acting recklessly and in bad faith must bear the additional liability for exemplary and punitive damages***. This scheme protects the legitimate interest of both constituencies, providing full and fair compensation to plaintiffs while avoiding unduly burdensome damage awards, save in the exceptional case where the defendant ***is motivated by ill-will or bad faith***.
>
> [*Id* at 137-138 (emphasis added) (footnote omitted).]

The *Peisner* Court assumed, without deciding, that publishing an article with "*knowledge* of falsity" would "establish bad faith, therefore proving the common-law malice required to justify an award of exemplary and punitive damages." *Id* at 138 n13 (italics in original).

Michigan is thus consistent with the prevailing national view that "punitive (or 'exemplary') damages . . . are usually available only when the tortfeasor has committed quite serious misconduct with a bad intent or a bad state of mind such as malice." Dobbs, *The Law of Torts*, §381, at 1062 (West, 2000). "For instance, it has been said that the defendant may be held liable for punitive damages if he is oppressive, evil, wicked, guilty of wanton or morally culpable conduct, or shows flagrant indifference to the safety of others." *Id* at 1064.

The conclusion that a plaintiff seeking punitive damages bears the burden of proving bad faith is inescapable when one considers that a plaintiff must prove malicious wrongdoing even to recover exemplary damages, which in Michigan are compensatory in nature and cannot

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be awarded to punish. Michigan's exemplary damages standard was articulated in *Veselenak v Smith*, 414 Mich 567; 327 NW2d 261 (1982), where this Court held that in order for those damages to be available, the defendant's "conduct must be ***malicious or so willful and wanton*** as to demonstrate a reckless disregard of plaintiff's rights." *Id* at 575 (emphasis added). The Court described the context in which exemplary damages have been found to be appropriate:

> As a practical matter, the conduct we have found sufficient to justify the award of exemplary damages has occurred in the context of the intentional torts, slander, libel, deceit, seduction, and other intentional (***but malicious***) acts. Due to the required mental element, negligence is not sufficient to justify an award of exemplary damages.
>
> [*Id* (emphasis added).]

Michigan's appellate courts have continued to adhere to this rigorous standard, holding that in order to justify an award of exemplary damages, a defendant's conduct must be "malicious" or "willful and wanton." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 487-488; 593 NW2d 180 (1999).

The threshold for recovering punitive damages does not become any less formidable just because those damages are made available by statute – and in fact the opposite is arguably true. This Court has recognized that where there "is a statutory provision having a punitive purpose, a higher standard of liability of warranted." *Comnercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 136 n5; 393 NW2d 161 (1986). "Virtually all authority sanctioning penalties and other punitive-type damages require the higher standard of malice or fraud." *Id.*

It is intuitively clear -- and becomes even clearer after a review of pertinent caselaw -- that a party who violates the law but does so in good faith, thinking that its conduct is lawful, cannot properly be assessed punitive damages. In the context of an insurance-based "bad faith" claim, for example, it has been recognized that "[g]ood faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith." *Id* at 136-137.

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"Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly or without concealment." *Id* at 137. And for purposes of satisfying the express "bad faith" standard in §6 of the Uniform Trade Practices Act (MCL 500.2006(4)), there must be a showing of "dishonest purpose or moral obliquity." *Commercial Union, supra* at 136 n5.

The SRCA's punitive, double-damages provision cannot properly be triggered by good faith breaches of sales-representation contracts. A showing of subjective bad faith should be required before those damages can be awarded, and in this context bad faith can be equated with a failure to pay commissions despite actual knowledge that they were owed.

An objective good-faith standard, examining the reasonableness of a defendant's decision not to pay the disputed commissions, would be unacceptable because under such a standard, defendants who honestly believed that commissions were not owed might still be assessed punitive damages based on a jury's hindsight scrutiny of how a hypothetical "reasonable person" would have interpreted the sales-representation agreement. As Michigan law makes clear, where there is no malice or willfulness, punitive damages are not appropriate.

C. *The Michigan Legislature's inclusion of a double-damages penalty in the SRCA evinces its intent that those damages be permitted only on a showing of bad faith, because when it enacted the SRCA, the Michigan Legislature is presumed to have been aware of Michigan precedent holding that an award of statutory multiple damages is not permitted unless there is a showing of willful or flagrant conduct, i.e., subjective bad faith.*

Michigan precedent has long reflected that statutory penalties and multiple-damage provisions are triggered only by a showing of bad faith, unless a statute directs that its penalty provision is mandatory. There is no reason to believe that the Michigan Legislature intended anything differently when it drafted the SRCA.

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In *Heath v Alma Plastics Co*, 121 Mich App 137; 328 NW2d 598 (1982), the plaintiff sued her former employer under Michigan's Minimum Wage Law, MCLA 408.393, MSA 17.255(13). In addition to an award for actual damages for unpaid wages, she sought an award of "liquidated damages" under the statute. See *id.* at 143. The trial court held that an award of liquidated damages was discretionary and declined to award them because "they would be 'too punitive'." *Id.* at 143-144. The Michigan Court of Appeals affirmed. Noting that the Legislature did not indicate whether the penalty was mandatory or discretionary, the court concluded that absent some contrary intent expressed in the statute, penalty damages could not be awarded in the absence of willful or flagrant misconduct:

> In the instant case, the Legislature gave no indication as to whether the liquidated damages provision was mandatory or discretionary. In the absence of a contrary intent, it is our opinion that the liquidated damages ***are clearly punitive in nature***, and were intended to be imposed ***only in cases of willful or flagrant violations***. The trial court did not err in denying plaintiff's claim for punitive damages.
>
> [*Id.* at 144 (emphasis added).]

The Michigan Court of Appeals echoed these principles in a later decision, although in recognizing a "good faith" exception to the statute's penalty damages provision the court seemed to combine a subjective standard with an objective "reasonableness" test:

> [W]e hold that under the Minimum Wage Law of 1964, a trial court may, in its discretion, deny an employee liquidated damages, costs, and attorney fees, if the employer shows to the satisfaction of the trial court that the act or omission giving rise to an action under the statute ***was in good faith*** and that the employer had ***reasonable grounds*** for believing that its act or omission was not in violation of the statute.
>
> [*Saginaw Firefighters Assoc v City of Saginaw*, 137 Mich App 625, 632; 357 NW2d 908 (1984) (emphasis added).]

This Court has also recognized the impropriety of assessing statutory multiple-damages awards where non-payment is based on a good-faith dispute. In *Gorham Bros Co. v Ann Arbor*

Railroad Co, 228 Mich 273; 200 NW 287 (1924), this Court reversed the trial court's imposition of double damages against a railroad company where there was no showing that overcharges were the result of malicious or intentional misconduct:

> Defendants also assigned and argued as error the award of double damages against the railroad company. Under the circumstances shown here, we are of opinion that contention is well founded. These overcharges were made under somewhat uncertain and disturbed conditions resulting from the world war. So far as shown they were paid by plaintiff without protest or complaint at the time of payment, and the record ***does not disclose, beyond the mere making of an overcharge, any malicious purpose or intentional misconduct*** on the part of the defendant demanding a special penalty.
>
> [*Id.* at 286 (emphasis added).]

In another suit seeking double damages under Michigan's Railroad Regulation Act (now found at MCLA 462.19, MSA 22.38), the Michigan Supreme Court held that imposing double damages was not appropriate where the defendant believed "it was within its legal rights" when engaging in the conduct that was ultimately found to violate the statute. *Federal Gravel Co v Detroit and Mackinaw Railway Co*, 263 Mich 341, 365; 248 NW 831 (1933).

This Court has also determined that a statute providing for treble damages against those who injure a public bridge or highway (now found at MCLA 230.7, MSA 9.337) applies "only to cases where active injuries or cases of willful misconduct of the kind enumerated in the statute are involved." *Struble v Republic Motor Truck Co*, 216 Mich 299, 310; 185 NW2d 792 (1921). It is noteworthy that the statute interpreted in *Struble* contained no language indicating that a "willful misconduct" threshold existed, yet given the punitive nature of the penalty the Court found that such a showing was required. *See id.*

The SRCA's double-damages penalty provision must be construed according to this precedent. The Legislature is presumed to have been aware of this precedent when it crafted the SRCA. *See Gardner v Van Buren Pub Schools*, 445 Mich 23, 49, 517 NW2d 1, 11 (1994)

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("In construing this statute, we are mindful of the presumption that the Legislature is aware of judicial interpretations of existing law when passing legislation.")

Given the Legislature's knowledge of Supreme Court precedent, it is evident that the Legislature intended that the penalty damages created by the SRCA, like the penalty damages available under every other penalty-damages statute that has been construed by the Court, cannot be awarded absent a showing of bad faith. *See, e.g., In Re Newton,* 238 Mich App 486; 606 NW2d 34, 37 (1999) (legislature is presumed to legislate in harmony with existing law).

And given the absence of explicit language in the SRCA indicating that penalty damages are mandatory, the Act must be interpreted narrowly to permit recovery of penalty damages only on a showing of willful or flagrant misconduct. It is settled that statutory penalty-damages provisions "must be strictly construed ***in favor of the person being penalized***." *Washburn v Michailoff,* 240 Mich App 669, 677; 613 NW2d 405 (2000) (emphasis added); see also *City of Belding v Maloney*, 360 Mich 336, 346; 103 NW2d 621 (1960) ("A statute awarding a penalty is to be strictly construed, and, before a recovery can be had, the case must be brought clearly within its terms."). The Michigan Legislature's use of the word "intentionally" is proof that the Legislature did not intend for penalty damages to be awarded unless a defendant acted in bad faith -- refusing to pay commissions that it knew had been earned.

D. The prevailing view across the country is that penalty damages for failure to pay commissions or wages are inappropriate where the failure to pay was based on a good-faith dispute over whether the commissions or wages were owed.

Although this Court is not averse to tackling novel legal issues for which there is a dearth of instructive authority, it is worth noting that the Court is by no means embarking on its analysis in this case "without a net." Although no Michigan appellate court has yet addressed the specific question of whether a plaintiff must establish bad faith before recovering penalty

damages under the SRCA, the well-settled rule in numerous jurisdictions across the country is that a good-faith dispute over a principal's obligation to pay precludes penalty damages. It is appropriate for this Court to consider instructive out-of-state cases under these circumstances. *See, e.g., People v Duffield*, 387 Mich 300, 314; 197 NW2d 25, 31 (1972) (looking, in part, to "American cases" because of the "lack of precedent or clear and definitive statement in Michigan cases").

In *Maher & Associates Inc v Quality Cabinets*, 640 NE2d 1000 (Ill 1994), *app denied* 647 NE2d 1011 (1995), the court interpreted the Illinois Sales Representative Act. The act contained no language elaborating on what state-of-mind must be proven, if any, for penalty damages to be imposed:

> A principal who fails to comply with the provisions of Section 2 concerning timely payment or with any contractual provision concerning timely payment of commissions due upon the termination of the contract with the sales representative, shall be liable in a civil action for exemplary damages in an amount which does not exceed 3 times the amount of the commissions owed to the sales representative.
>
> [*Id.* at 1008 (quoting Illinois Sales Representative Act, Ill. Rev. Stat. 1991, ch. 48, ¶2250).]

The Illinois Court of Appeals reversed the trial court's ruling that this statute did not require a finding of bad faith before exemplary damages could be imposed. While recognizing that "the statute makes no mention of bad faith or culpability," the court observed that Illinois caselaw "makes it clear that punitive damages should not be awarded absent a finding of culpability that exceeds bad faith." *Id.* at 1008. On remand, the plaintiff would only be entitled to exemplary damages if it could demonstrate that the defendant's "behavior in withholding those commissions beyond the statutory period was outrageous and the moral equivalent of criminal conduct." *Id.* at 1009.

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The Iowa Supreme Court's decision in *Halverson v Lincoln Commodities Inc*, 297 NW2d 518, 521 (Iowa 1980), is perhaps the most instructive out-of-state case given that it interpreted a wage payment collection statute containing language ***identical*** to that contained in Michigan's SRCA. The Iowa statute provides for the recovery of liquidated damages if the plaintiff establishes that an employer has "intentionally failed to pay" an employee outstanding wages. See I.C.A. §91A.8. The *Halverson* court held that an employer "incurs no penalty if at the time of termination there was an honest dispute between the employer and the employee as to the amount due." *Id* at 523 (quoting 48A Am Jur2d, Labor and Labor Relations, §2617).

More recently, the Iowa Supreme Court reaffirmed the rule that penalty damages "are not available if an employer maintains a good faith dispute over the amount of wages," explaining that the "intentionally failed to pay" provision of the statute is "directed at employers ***who fail to pay wages knowing the wages are due***." *Condon Auto Sales & Service, Inc v Crick*, 604 NW2d 587, 598 (Iowa 1999) (emphasis added).

CBI's requested special jury instruction in the present case provided a definition virtually identical to that adopted by the Iowa Supreme Court -- that an intentional failure to pay under Michigan's SRCA "means that Defendant knew a commission was due to the Plaintiff and chose not to pay it." (See Opinion and Order, at 20, **Apx.** at 228a).

The South Carolina Supreme Court has also held that "[t]he imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh." *Rice v Multimedia Inc.*, 456 SE2d 381, 383 (SC 1995). In *Rice*, an advertising salesperson sued his former employer seeking unpaid wages, as well as "an amount equal to three times the full amount of the unpaid wages," under South Carolina's Wage Payment Act, S.C. Code Ann. §41-10-80(C). Despite a verdict finding that the employer violated the Act, the trial court declined to award treble damages, "holding that the provision did not apply to employers who withhold wages in good faith." *Rice, supra*, at 383. The South Carolina Supreme Court affirmed,

rejecting the employee's argument that the treble damage provision was "not subject to any good faith exceptions." *Id.*

The court relied on an Arizona Court of Appeals decision articulating the rationale for a good faith defense to penalty-damages claims:

> [T]here are some wage disputes when the issue may involve a valid close question of law or fact which should properly be decided by the courts. We do not believe the Legislature intended to deter the litigation of reasonable good faith wage disputes; we do believe the Legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute.
>
> [*Id.* at 383 (quoting *Apache East, Inc v Wigand*, 580 P2d 769, 773-774 (Ariz. 1978)).]

The South Carolina Supreme Court's reliance on Arizona caselaw to express these principles is not surprising, given that Arizona's "courts have consistently held that treble damages should not be awarded in such good faith disputes." *Sanborn v Brooker & Wake Property Mgmt*, 874 P2d 982, 985 (Ariz 1994). The Arizona Court of Appeals has observed that its Legislature "did not intend to deter the litigation of good faith wage disputes by enacting the treble damages provision of its unpaid wages statute." *Id.* The Arizona statute was eventually amended to include explicit language providing for a good faith defense to the imposition of treble damages. But Arizona appellate courts interpreting the statute's predecessor, which did not include such explicit language, still adhered to the good faith rule. See *Apache E v Wiegand*, 580 P2d 769, 773-774 (Ariz 1978); *Quine v Godwin*, 646 P2d 294, 298 (Ariz 1982).

Kansas has also accepted this rule. In *Holt v Frito-Lay, Inc.*, 535 P2d 450 (Kan 1975), the Kansas Supreme Court reversed a judgment assessing penalty damages because the trial court's instructions may have mistakenly created the impression that an "honest dispute" concerning an obligation to pay wages could only exist where an employer is ultimately found

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to owe its former employee the exact sum asserted by the employer. The Court felt that this was an unduly narrow and inaccurate articulation of the "honest dispute" rule, because "[i]f the employer and employee in good faith disagree as to the amount due, there exists an 'honest dispute' regardless of the amount finally found to be due." *Id.* at 455. "If there is an honest dispute, the so-called penalty statute has no application," but where an employer "fails to act in good faith in denying the wages due, then the penalty or exemplary damages may properly apply." *Id.*

This holding was consistent with the Kansas Supreme Court's previous decision in *Bradshaw v Jayco Enterprises, Inc*, 510 P2d 174 (Kan 1973), holding that where an employer's failure to pay the disputed wages is based on an honest good faith dispute, "it would be harsh and unjust indeed to apply the penalty statute." *Id.* at 175. Because in *Bradshaw* the "record reveal[ed] a legitimate controversy or an honest dispute over the terms of the [employment] agreement," the court affirmed the trial court's finding that the penalty statute did not apply. *Id.*

In *Jones v Hebert & LeBlanc, Inc*, 499 So2d 1107 (La 1986), the Louisiana Court of Appeals likewise determined that the plaintiff could not recover penalty damages even though he was entitled to recover unpaid commissions due under his former contract of employment. Louisiana's statute contained no "scienter" language in its penalty damages provision. See *id.* at 1111 (quoting La. R. S. 23:632). Nevertheless, the court affirmed the trial court's denial of plaintiff's request for penalties because the parties disputed the terms and effect of the employment contract: "Where there is a bona fide dispute over the amount of wages due, the courts will not consider the failure to pay as arbitrary refusal and will refuse to award penalties." *Id.* at 1111-1112 (citations omitted).

The Alaska Supreme Court has also adopted this approach. It affirmed the denial of penalty damages to former employees who proved that their former employer failed to pay wages to which they were entitled. No penalties could be imposed since there was no evidence

that the defendant "intentionally withheld wages due." *Klondike Indus. Corp.*, 741 P2d 1161, 1171 (Alaska, 1987).

Interpreting a statute providing for penalties against an employer that "willfully fails to pay" wages, the Oregon Supreme Court refused to permit penalties where a "defendant's failure to pay plaintiff his commissions was based on a bona fide belief that no commissions were due under the terms of the employment agreements." *Hekker v Sabre Construction Co*, 510 P2d 347, 351, 352 (Or. 1973). The court observed that "[a]n employer acts willfully if, having the financial ability to pay wages which he knows he owes, fails to pay them." *Id.* at 351.

There is no reason to conclude that the Michigan Legislature intended to depart from these nationally-accepted principles in drafting the SRCA. The Legislature's use of the word "intentionally" was an obvious effort to impose a high scienter threshold before the double-damages penalty could be imposed. (In fact, as will be explained in more detail later, the Legislature added the term "intentionally" after Governor Engler vetoed the original bill because it lacked a tough threshold for recovering what he considered to be "exemplary" damages.) Although a few of the national cases contain language suggesting an objective standard, the Michigan Legislature's use of the word "intentionally" should lay to rest any doubts that actual knowledge that a commission is due, and nonpayment despite that knowledge, is required in order to trigger penalty damages under the SRCA.

E. Caselaw and legislative history debunk plaintiff's suggestion that the Legislature intended the SRCA's punitive damages provision to be triggered whenever nonpayment was based on anything other than a clerical error. Plaintiff's dictionary-definition approach, advocating that a lay definition of the term "intentionally" must control, is untenable.

Plaintiff has argued throughout this case that the phrase "intentionally failed to pay" should be construed according to a "lay" or "ordinary" definition of the term "intentional."

According to plaintiff, in this context that definition dictates that every nonpayment of earned commissions, other than those based on a clerical oversight, must trigger penalty damages, even if the principal held a good-faith belief that it had no obligation to pay. And plaintiff insists that the Legislature's failure to include an express bad-faith requirement precludes courts from imposing a bad-faith requirement. Plaintiff has even suggested that legislative history shows that the "intentionally failed to pay" standard was intended to *lower* the threshold for recovering punitive damages under the SRCA.

These arguments cannot be reconciled with Michigan law or the SRCA's legislative history. The term "intentionally" is ambiguous in this context. It is also a term of art that the Legislature added to the SRCA in order to *heighten* the threshold for recovering penalty damages (in response to Governor Engler's veto), not lower it. Plaintiff's argument also ignores the fact that when the Legislature enacted the SRCA, it knew of this Court's previous decisions requiring plaintiffs to show willful and wanton misconduct before recovering statutory penalty damages. The SRCA should be construed to require a showing of subjective bad faith before punitive damages are awarded because that is what the Legislature intended.

1. The "Plain Language" approach advocated by plaintiff is inappropriate because the term "intentionally" is not plain and unambiguous in this context, and that approach also ignores the fact that the term "intentional" is a term of art

There are a number of fundamental defects in plaintiff's argument that the SRCA's "intentionally failed to pay" clause must be given its "ordinary" meaning, and that the Michigan Legislature's failure to include a "bad faith" requirement in the express language of the SRCA indicates that it did not intend to limit the Act's penalty damages to cases involving bad faith.

First, plaintiff's argument conflicts with the unbroken line of Michigan cases (discussed earlier) in which this Court read a bad-faith standard into statutes authorizing punitive damages even though those statutes said ***nothing*** about bad faith. Plaintiff has suggested that those cases do

not control because the statutes in those cases did not specify a standard of conduct, whereas the SRCA specifies an "intentionally failed to pay" standard. But including specific state-of-mind language should not give rise to an assumption that a *lower* scienter threshold has been created. Moreover, regardless of whether those cases control this Court's ultimate construction of the SRCA, they undeniably stand for the proposition that a Michigan court may require a showing of bad faith under a punitive-damages statute even if the statute does not contain the words "bad faith."

Second, plaintiff's argument erroneously assumes that nothing in the SRCA evidences the Legislature's intent to adopt a bad-faith standard for an award of penalty damages. The very fact that the Legislature created penalty damages evidences the Legislature's intent that they would be available only on a showing of bad faith. This is so because when the Legislature created the penalty damages, it knew (as discussed earlier) that when the Michigan Supreme Court has been confronted with statutes authorizing penalty damages in the past, it has held that a plaintiff may not recover those damages absent a showing that the defendant acted in bad faith.

Third, plaintiff's argument presumes that there *is* some uniform "lay" or "ordinary" definition of the term "intentionally" that would naturally prevail in this context. That is a dubious presumption. It is highly questionable that all lay or "ordinary" people would agree that there was an "intentional" nonpayment where a principal's nonpayment was based on its honest belief that it had no contractual obligation to pay.

The "plain language" approach to statutory construction applies only where the meaning of a statute is clear on its face. Where a statute's meaning is not clear on its face, a court may look beyond the words of the statute in order to arrive at the proper construction. *Rowel v Security Steel Processing Co*, 445 Mich 347, 353-54, 518 NW2d 409, 412 (1994).

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The SRCA's "intentionally failed to pay" clause is ambiguous on a number of levels. It suffers from semantic ambiguity because it is capable of multiple, inconsistent meanings, particularly in this context. See, e.g., *Dombrowski v Swiftships, Inc*, 864 F Supp 1242, 1247 (SD Fla 1994) (finding that the words "may make" in the Federal Arbitration Act created a semantic ambiguity because they were capable of multiple, inconsistent meanings concerning whether they were "words of illustration, or instead words of limitation"). "Intentionally" could encompass anything other than an accidental nonpayment, or it could mean a refusal to pay when a principal knows that the contract requires payment.

And even if there was merit to plaintiff's argument that the clause has some uniform and "ordinary" meaning (which is not the case), the clause would still suffer from "latent" ambiguity, which exists where the language used appears clear and suggests some meaning, but an extrinsic fact creates the possibility of more than one meaning. See *Thurston v Thurston*, 140 Mich App 150, 153 (1985). Where a statute contains latent ambiguities "despite its superficial clarity," it is appropriate for courts to look to the statute's legislative history for guidance. See, e.g., *West v Kerr-McGee Corp*, 765 F2d 526, 530 (5th Cir 1985); see also *Walton v Hammons*, 192 F3d 590, 598 (6th Cir 1999) (examining legislative history and intent where statute contained latent ambiguity).

The judges and commentators who have attempted to flesh out the meaning of the SRCA's "intentionally failed to pay" clause have recognized the clause's ambiguity – and in no uncertain terms. The federal district court in the present case found the SRCA "to be one of the most haphazardously and inartfully drafted pieces of legislation that it has ever been called upon to review," and that "numerous terms critical to an informed understanding of the legislation are left completely undefined and several provisions are, at best, ambiguous and susceptible to differing interpretations." (R.67, Opinion and Order regarding post-trial motions, at 15, **Apx.** at 54). These vagaries included the "intentionally failed to pay" clause, which the district judge admitted was

"hard" to interpret and subject to various interpretations in this context. (R.78, Tr. Vol. 4 at 437-438, **Apx.** at 722-723). The Sixth Circuit's certification of the question to this Court also speaks volumes.

Likewise, commentators have observed that the language of the Act "is [so] unclear on many key points" that "unless it is amended, the courts will have to unravel its meaning and determine the scope of its application." Saylor & Acomb, *supra* at 208.

The use of the term "intentionally" is at the heart of the SRCA's ambiguity. Numerous case opinions reveal that even appellate judges have wrestled with the meaning of the term "intentional" in a variety of contexts. For example, in *Garcia v City of Jackson*, 152 Mich App 254, 269 (1986), *vacated* 430 Mich 877 (1988), a concurring judge noted the existence of "some confusion as to what courts mean by the use of the word 'intentional' in the phrase 'intentional nuisance'." *Id.* at 268. He expressed dissatisfaction with the majority's "definition for the word 'intentional.'" *Id.* at 269. The Michigan Court of Appeals has also recognized that conduct triggering insurance policy exclusions for "intentionally caused" harm is not necessarily the same type of conduct as that establishing an "intentional tort" under Michigan's Workers Disability Compensation Act. See *Cavalier Mfg Co v Employers Insurance of Wausau*, 211 Mich App 330, 334 (1995), *and on remand at* 222 Mich App 89, 96 (1997). Indeed, the Michigan Court of Appeals has expressed frustration over the "amorphous vista of the intentional tort exception" to Michigan's workers' compensation statute, even though the term "intentional tort" is specifically defined in the statute. *Golec v Metal Exchange Corp*, 208 Mich App 380, 386 (1995), *rev'd Travis v Dreis & Krump Mfg Co.*, 453 Mich 149 (1996). Michigan's appellate courts have also looked to Restatement provisions and treatises to unscramble the meaning of "intent." See, e.g., *Travis v Dreis & Krump Mfg Co*, 453 Mich. 149, 170-171 (1996) (quoting 1 Restatement Torts 2d, §8A, p. 15, and Prosser & Keeton, Torts (5th ed.) §8, p. 34, 36*); see also Garcia, supra*, at 269-271.

Plaintiff's dictionary-definition argument also ignores the fact that the term "intentional" is a term of art, carrying with it legal definitions subtly different than the meaning commonly ascribed to it by laypersons depending on the legal context in which it is found. See, e.g., *United States v Doe*, 136 F3d 631, 640 (9th Cir 1998) (Fletcher, J., dissenting) (noting that "intentional" is a "term of art"); *Arena v J.A. Jones Construction Co*, 387 So2d 685, 686 (4th Cir 1980) (phrase "intentional act" in Louisiana statute governing availability of tort action for workplace injuries "is a term of art"); *Powers v MJB Acquisition Corp.*, 184 F3d 1147, 1153 (10th Cir 1999) ("intentional discrimination" under the Americans with Disabilities Act are "words of art").

For instance, in determining whether a defendant's improper release of documents under the federal Privacy Act was "intentional or willful," the Northern District of Illinois found that the defendant's reliance on "the common definitions of these terms as referring to 'conscious,' 'knowing' and 'designed' acts, citing Blacks Law Dictionary," failed "to account for more subtle characterizations that courts have used to describe the terms." *South v Federal Bureau of Investigation*, 508 F Supp 1104, 1106 (ND Ill 1981). Instead, the court observed, the statutory terms "intentional or willful" were "used as terms of art and given broader scope than the common definition would imply." *Id.* at 1107. The same is true here.

White v Office of Personnel Mgmt., 840 F2d 85 (DC Cir 1988), is on point. There, the plaintiff, an administrative law judge applicant, sought damages under the Federal Privacy Act based on the defendants' admittedly-mistaken decision not to solicit the plaintiff's listed references. The defendants' decision not to contact plaintiff's references resulted in the plaintiff failing to obtain certification for administrative law judge positions that he was actually qualified for. Under the statute, damages may be awarded only if "the court determines that the agency acted in a manner which was intentional or willful." *Id.* at 87 (quoting 5 USC §552a(g)(4)).

At the outset, the court noted that there was, "of course, ***no dispute that the agency acted 'intentionally' and 'willfully' in the generic sense of those words***: the agency does not suggest

that the decision not to solicit the references was unintentional or involuntary." *Id* (emphasis added). The plaintiff therefore argued (as plaintiff does here) that "so long as the agency action was not the result of oversight, the standard of §552a(g)(4) has been met." *Id.* The court rejected this argument.

The court observed that the statutory terms "intentional" and "willful" cannot simply be ascribed their common meanings in determining the defendants' liability for damages:

> [T]he words "intentional" and "willful" in §552a(g)(4) do not have their vernacular meanings; instead, they are terms of art. This court has interpreted them to set a standard that is "somewhat greater than gross negligence." Specifically, "[s]ection 552a(g)(4) imposes liability only when the agency acts in violation of the Act in a willful or intentional manner, either by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act."
>
> [*Id.* (quoting *Hill v United States Air Force*, 795 F2d 1067, 1070 (DC Cir 1986) and *Albright v United States*, 732 F2d 181, 189 (DC Cir 1984)).]

Thus, evidence that there was a conscious and voluntary decision not to solicit the critical references, as opposed to an involuntary oversight, did *not* establish that the defendants' conduct was "intentional" so as to permit an award of damages for the "intentional" or "willful" violation of the statute.

Similarly, in the present case, CBI President Anders Ragnarsson's testimony that he made a conscious and voluntary decision not to pay commissions that CBI firmly believed were not owed, did not answer the critical question of whether the nonpayment of those commissions could properly trigger penalty damages for an "intentional" failure to pay. His testimony was merely ***the starting point*** for a proper penalty-damages analysis. In other words, once it is determined that a nonpayment of commissions was conscious and voluntary, the question becomes whether that conscious and voluntary decision was based on an honest, good-faith belief that the commissions

were not owed under the terms of the sales-representation contract, or, instead, was a bad-faith attempt to avoid paying commissions that the principal knew it owed.

Because the word "intentionally" is hardly susceptible to a readily-ascertained and definitive meaning in this context, is a term of art, and was found to be ambiguous and susceptible to different interpretations by the trial court, it is entirely appropriate for this Court to provide guidance on the necessary standard of proof under that provision. Where, as with the SRCA, the language of a statute is far from plain, the "plain language" approach to statutory construction has little utility.

2. ***The "plain language" of a Michigan statute must be read in context, and the context of the phrase "intentionally failed to pay" in the SRCA shows that the phrase does not preclude this Court from holding that penalty damages may be awarded only upon a showing of bad faith.***

Even if it were assumed that the phrase "intentionally failed to pay" is "plain," it should not be read in a vacuum. On the contrary, the "plain language" of Michigan statutes "should be read in context." *Tennile v Action Distributing*, 225 Mich App 66, 70, 570 NW2d 130, 132-33 (1997). More specifically, where the term "intentional" appears in a statute, that term "must be interpreted in [its] context to determine [its] meaning." *Albright v United States*, 732 F2d 181, 189 (DC Cir 1984) (interpreting term "intentional" as used in the federal Privacy Act).

The phrase "intentionally failed to pay" lies within a provision of the SRCA that permits ***punitive damages***, and that context is particularly important for two reasons. First, as stated previously, statutory provisions that create penalty damages must be "strictly construed in favor of the person being penalized." *Attorney General v Biewer Co*, 140 Mich App 1, 9, 363 NW2d 712, 716-17 (1985); *DeKind v Gale Man. Co*, 125 Mich App 598, 337 NW2d 252, 256 (1983), *overruled on other grounds*, *Boden v Detroit Lions, Inc*, 193 Mich App 203, 483 NW2d 673 (1992). Thus, courts are obligated to construe "intentionally failed to pay" as narrowly as

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possible, and in the defendant's favor. It would be fully consistent with that obligation for this Court to hold that punitive damages cannot be recovered under the SRCA absent a showing of bad faith. In contrast, plaintiff's dictionary-driven construction of "intentionally failed to pay" – allowing penalty damages to be assessed for every failure to timely pay post-termination commissions so long as the failure to pay was not accidental – is neither a narrow construction, nor is it a construction in CBI's favor. Therefore, it must be rejected.

Second, as discussed earlier, statutory penalty damages have not been available in Michigan absent a showing that the defendant acted in bad faith. It is reasonable to conclude that when the Legislature used the phrase "intentionally failed to pay" in the SRCA's statutory penalty damages provision, the Legislature intended that the threshold for assessing penalty damages under the SRCA would mirror the standard that has always governed the assessment of statutory penalty damages in Michigan – bad faith.

3. ***The Legislature added the "intentionally failed to pay" language to the SRCA in order to increase, not decrease, the burden on a plaintiff seeking penalty damages under the Act.***

During this case, plaintiff has argued that the Michigan Legislature used the phrase "intentionally failed to pay" in the SRCA's penalty damages provision in order to create a "lower" burden on plaintiffs seeking penalty damages. This couldn't be further from the truth. The "intentionally failed to pay" clause was added after Governor Engler vetoed the bill because it lacked a high threshold for recovering penalty damages. He signed it only after the formidable "intentionally failed to pay" threshold was added.

The SRCA began as Senate Bill 36 in the 1991 session of the Michigan Legislature. See Saylor & Acomb, supra at 208. Senate Bill 36, which was patterned after a model act drafted by the Bureau of Wholesale Representatives, provided, among other things, that a principal that failed to pay post-termination sales commissions would be liable for a penalty of double the sales

representative's actual damages or $100,000, whichever was less. (*See* House Legislative Analysis Section of Senate Bill 36 with House Committee Amendments, dated June 6, 1991[2], Addendum B.) The bill said nothing about "intentionally" failing to pay, and in fact the bill said nothing about the showing that had to be made in order to recover the double-damages penalty. (*See id*).

Both houses of the Michigan Legislature eventually passed Senate Bill 36, but Governor Engler vetoed it. Saylor & Acomb, *supra* at p. 208. Governor Engler explained that he vetoed the bill in large part because he "opposed[d] the use of exemplary damages in contract actions absent broad public policy considerations ***and particularly in this case where exemplary damages would be assessed without consideration of the underlying factors resulting in the breach***." (See July 15, 1991 Letter from Governor John Engler to the Michigan Senate, Addendum C, emphasis added).

Governor Engler's veto showed that if the Legislature wanted to have a sales representative bill signed into law, it would have to ***increase*** the burden on a sales representative seeking penalty damages. In the legislative session immediately following Governor Engler's veto, the Legislature amended Senate Bill 36 by adding to it, among other things, the provision limiting penalty damages to cases in which the principal "intentionally failed to pay" commissions. (*See* Senate Fiscal Agency Analysis of Enrolled Senate Bill 717, Dated June 15, 1992, Addendum A.) The amended bill passed the Legislature overwhelmingly, and was signed into law by Governor Engler. See Saylor & Acomb, *supra* at p. 208.

In light of the fact that the "intentionally failed to pay" language was added as an immediate response to Governor Engler's veto, it is clear that the language was intended to ***limit*** the availability of penalty damages – not to make penalty damages readily available regardless of a

[2] The Court's caution against using bill analyses as an indicator of legislative intent in *Lynch* did not suggest that the analyses may not be used to show the content of a bill as it made its way through the legislative process.

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defendant's state-of-mind. The phrase was added to ensure that plaintiffs could not recover penalty damages unless they demonstrated, in Governor Engler's words, that "the underlying factors resulting in breach of contract" warranted the assessment of such damages in a breach of contract case. And a fact-finder assessing the "underlying factors resulting in breach of contract" would consider far more than solely whether the principal's nonpayment was voluntary.

Finally, plaintiff will undoubtedly suggest that this Court should attach significance to the fact that the SRCA, by virtue of the "intentionally failed to pay" standard, differs from the model sales representative statute. But the real significance is that the Michigan Legislature, in response to Governor Engler's veto, deviated from the model bill because the model bill did not sufficiently restrict the availability of penalty damages. Simply put, the Legislature added the "intentionally failed to pay" language because the model bill was not "tough enough" on penalty damages, not, as plaintiff argues, because the model bill was "too tough" on such damages.

4. The SRCA's "intentionally failed to pay" provision was not a quid pro quo for the purportedly "low" $100,000 cap on damages.

During oral arguments in the Sixth Circuit, plaintiff's attorney suggested that the Michigan Legislature adopted a liberal "intentionally failed to pay" standard in the SRCA (supposedly penalizing any conscious nonpayment of commissions even if done in good faith) as a *quid pro quo* for the Act's purportedly "low" $100,000 cap on penalty damages. In other words, plaintiff claims that because the $100,000 maximum penalty permitted under the SRCA is such a relative pittance, this is evidence that the Legislature must have been trying to "even the playing field" by adopting an "intentionally failed to pay" standard that makes it very easy for plaintiffs to recover penalty damages. Even if one accepted plaintiff's preposterous claim that a $100,000 penalty is a "low" figure, this argument would still be fatally flawed.

The Legislature added the $100,000 cap on penalty damages to the SRCA during its 1991 session. (See House Legislative Analysis Section Analysis of Senate Bill 36 With House

Committee Amendments, Dated June 6, 1991, Addendum B.) But, as described above, the Legislature did not add the "intentionally failed to pay" language to the statute until its 1992 session (after Governor Engler's veto of Senate Bill 36). The fact that the Legislature inserted the $100,000 cap long before it adopted the "intentionally failed to pay" standard shows that the "intentionally failed to pay" standard could not possibly have been a *quid pro quo* for the "low" $100,000 cap.

RELIEF REQUESTED

Defendant-Appellant Continental Biomass Industries, Inc. asks this Court to issue an opinion declaring that in order for a plaintiff to recover a double-damages penalty under the SRCA, he or she must satisfy a subjective bad faith standard requiring proof that the defendant actually knew that the disputed commissions were owed, but nevertheless refused to pay them.

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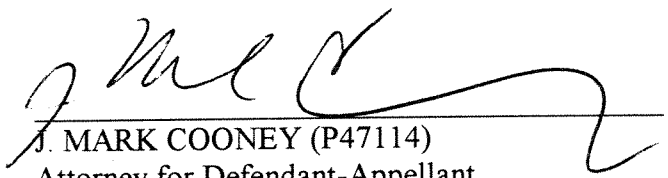
BY: 

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STATE OF MICHIGAN

IN THE SUPREME COURT

KENNETH HENES SPECIAL PROJECTS, PROCUREMENT, MARKETING AND CONSULTING CORPORATION,

Plaintiff-Appellee,

v.

CONTINENTAL BIOMASS INDUSTRIES, INCORPORATED,

Defendant-Appellant.

Case No. 120110

U. S. Court of Appeals for the Sixth Circuit Docket No. 00-1267

Appeal from the U.S. District Court for the Eastern District of Michigan No. 98-CV-72966-DT Honorable Gerald E. Rosen

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CERTIFICATE OF SERVICE

Beverly A. Sutherlin says that on the 20th day of June, 2002, she served two copies of *Defendant-Appellant Continental Biomass Industries, Inc.'s Brief on Question of Law Certified by the United States Court of Appeals for the Sixth Circuit* and *Joint Appendix* on Randall J. Gillary, 201 West Big Beaver Road, Suite 1020, Troy MI 48084 by placing same in sealed envelope(s) with postage fully prepaid thereon, and depositing same in a United States Mail receptacle.

I hereby declare that the statement above is true to the best of my knowledge, information and belief.

Beverly A. Sutherlin